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FILED

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1947.

No. 694

KENNETH M. WAITE,
Petitioner,

vs.

J. ELLIS OVERLADE, Warden United States Penitentiary,
Terre Haute, Indiana,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals
for the Seventh Circuit.

BENJAMIN G. COX,
613 Merchants National Bank Bldg.,
Terre Haute, Indiana,
Counsel for Petitioner.

GILBERT W. GAMBILL,
EATON J. DUDLEY,
Terre Haute, Indiana,
Of Counsel.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.

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To the United States Circuit Court of Appeals for the Seventh Circuit.

(Note: All page references to Exhibits are to numbers identified by the trial court reporter's initials "E. W.")

To the Honorable Fred M. Vinson, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Kenneth M. Waite, respectfully shows:

I.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

A.

This is an habeas corpus action filed in the District Court of the United States for the Southern District of Indiana (R. 2), to which respondent made a return (R. 19) and

petitioner filed a traverse (R. 23). A writ issued (R. 18) and after hearing (R. 26-48) submission of proposed findings and briefs by both petitioner (R. 48-58) and respondent (R. 59-66) the District Court stated its special findings of fact and conclusions of law (R. 67-73) and entered judgment December 30, 1946, discharging the writ and remanding petitioner to custody (R. 73). After petitioner's motion in the alternative to amend and make additional findings of fact or for a new trial (R. 74-84) was overruled by the District Court (R. 85), an appeal was taken by petitioner to the United States Circuit Court of Appeals for the Seventh Circuit (R. 85-92), which Court affirmed the judgment of the District Court on December 19, 1947 (R. 102) with opinion (R. 97), 164 Fed. 2d 722. Petition for rehearing was denied by the Circuit Court of Appeals without opinion on January 10, 1948 (R. 102).

B.

Petitioner is a military prisoner confined in the custody of respondent under sentence of an United States General Court-martial pronounced in Lancashire, England, on August 27, 1943 (R. 70). The sentence was life imprisonment ultimately reduced to fifteen years (R. 72) (and since perfecting this appeal further reduced to ten years) for the alleged crime of rape on one Annie Parry in Lancashire, England, on the night of August 2, 1943 (R. 68).

Petitioner was a member of the Army of the United States at the time of the alleged crime and at the time of trial (R. 49). Remedies for military review have been exhausted (R. 71, Petitioner's Exhibit C). Petitioner is a natural born United States citizen, and has never been and is not an United States enemy combatant or belligerent (R. 2, 20).

Petitioner met the prosecuting witness, Annie Parry, in a tavern bar about a week before the alleged crime (Peti-

tioner's Exhibit A p. 145). At this time the accused and the girl spent about half an hour "kissing, necking and talking," but he desisted with further advances on her request (Petitioner's Exhibit A 146, 203). They made arrangements to meet a week later and the girl saw petitioner on this night, but they were not in each other's company, as she had to work (Petitioner's Exhibit A 148). The girl went to the same tavern bar the next night and met petitioner (Petitioner's Exhibit A 149). The girl abandoned other American companions and joined petitioner this night (Petitioner's Exhibit A 149) and they walked together to the scene of the alleged crime, which was approximately seventy steps from a sentry post manned by sentries, none of whom testified to have heard any outcry of the girl (R. 34, Petitioner's Exhibit A 169, 191-195). This dispute at the trial was the question of consent, or the use of force. The girl testified that there was resistance (Petitioner's Exhibit A 114, 115). From the inception of the investigation petitioner has admitted intercourse with the consent of the girl and testified that there was no resistance (Petitioner's Exhibit A 208, 209). The American Army Surgeon who examined the girl reported that in his opinion the lack of sufficient bruise marks indicated there was not much of a struggle (Petitioner's Exhibit A 47 [b]).

The British police investigated the episode for the prosecution (Petitioner's Exhibit A 34-79) and testified at the trial (Petitioner's Exhibit A 99, 100). Petitioner was confined under arrest from August 3, 1943, continuously until the present time (Petitioner's Exhibit A 10, 230, R. 68).

The court-martial by general sentence convicted the petitioner of rape, but recommended clemency, stating that "it was the opinion of the Court that this incident occurred only because of the encouragement given by the complaining witness over a period of weeks. On the night

in question, the accused did not solicit the company of the complaining witness, who undoubtedly took the initiative in being in his company" (Petitioner's Exhibit A 242). The complaining witness and her mother, after having determined that the complaining witness was not pregnant, admitted in writing that she was partly to blame for the incident (Petitioner's Exhibits A 245, 246).

The convening officer upon receipt of the clemency recommendation and the admissions from the prosecuting witness of collaboration in the alleged crime, instead of ordering a new trial, caused a post-trial ex parte investigation to be carried out "to determine if there was any probability of a retraction of the testimony of the prosecuting witness" (Petitioner's Exhibit B 9).

C.

The grounds of petitioner's petition for a writ of habeas corpus were two-fold (R. 2-5):

First: That the court-martial sentencing petitioner was without jurisdiction of the subject matter because there was no showing that the court-martial was convened by an officer authorized by the Articles of War to convene the Court; the officer convening the Court acted without having considered the results of a pre-trial investigation carried out in substantial compliance with Article of War Seventy for guidance; there was no showing that an officer authorized by the Articles of War to act referred petitioner's case to the Court for trial; and there was no showing that petitioner's sentence was ordered executed by an officer authorized to act.

Second: The court-martial proceedings by which petitioner was sentenced were not carried out by due process of law in that the Court proceeded without jurisdiction as indicated above; a pre-trial investigation required by

Article of War Seventy was not carried out; petitioner was denied the right to examine witnesses against him who were available, and to properly prepare for trial during the pre-trial investigation; the Trial Judge Advocate prosecuted the case in an unfair and partial manner in that he collaborated with the British authorities without regard to petitioner's rights of defense and ignorance of the results and effect of the pre-trial investigation; the defense counsel and assistant defense counsel appointed for petitioner were incapable of asserting or protecting petitioner's fundamental rights preceding and during said trial; the court-martial manifestly misunderstood the definition of and necessary elements of the crime of rape; the Staff Judge Advocate and convening authority on review by post-trial, ex parte investigation, and partial investigation, sought to sustain the sentence of the court-martial predicated on an erroneous concept of the crime of rape, rather than return the case to trial to determine what facts concerning the use of force the court-martial believed and what facts they disbelieved (Petitioner's Exhibit A 242).

The District Court stated no findings of fact as to whether or not a pre-trial investigation in compliance with Article of War Seventy was carried out (R. 67-72, 83).

D.

The Circuit Court of Appeals erroneously assumed that the District Court had stated special findings of fact (R. 98, 164 Fed. 2d 722, 723) concerning the pre-trial investigation and in affirming the District Court decided the following propositions of law:

(1) Whether or not a pre-trial investigation was carried out in the General Court-martial proceedings in substantial compliance with Articles of War Seventy is immaterial to a determination of the authority to incarcerate the

accused under the sentence of the General Court-martial either on jurisdictional or due process grounds.

(2) The Federal Civil Court in habeas corpus proceedings is limited to an inquiry into whether the General Court-martial was properly constituted, the accused was subject to military law, and the offense charged was included in the Articles of War, even though the prisoner involved is a United States citizen and not an enemy belligerent, and the offense tried was criminal rather than involving laws of war or military discipline. The Federal Civil Court may not inquire into errors of law committed, nor the manner of proceedings of the court-martial, the pre-trial investigation, or the ex-parte military review (R. 99, 164 Fed. 2d 722, 723).

(3) The respondent relying on the General Court-martial judgment does not have the burden to prove the contested issues that the charges against the accused were investigated in substantial compliance with Article of War Seventy before trial, the court-martial was convened in the exercise of the personal discretion of officers authorized by law to convene the Court, the case was referred to the General Court-martial for trial by an officer authorized by law to refer the matter for trial only after personally considering the results of an adequate pre-trial investigation, that petitioner was afforded the services of both competent defense counsel and competent assistant defense counsel, and that the errors of law, if any, committed in the court-martial proceedings in the aggregate were not such as to deny the basic guarantee of fairness afforded the petitioner by the 5th Amendment of the United States Constitution.

E.

The only evidence introduced in the District Court material to the contested issues was petitioner's testimony and the court-martial record (R. 26-47).

In this habeas corpus action, petitioner contends that the following facts are proven by the court-martial record supplemented by petitioner's testimony in corroboration of the court-martial record, and by respondent's failure to sustain the ultimate burden of proving the contested facts wherein the court-martial record is incomplete:

1. The General Court-martial which tried petitioner was convened by military order issued by one George S. Andrew, Chief of Staff, on July 23, 1943, which order recites "By command of Brig. Gen. Collins" rather than by the personal act of the Commanding General, Western Base Section, Services of Supply, European Theatre of Operations, United States Army, in the exercise of judicial discretion (Petitioner's Exhibit A 101).

2. Petitioner was arrested and confined on August 3, 1943 as being suspected of having committed the crime of rape upon one Annie Perry during the night of August 2nd and 3rd, 1943 (Petitioner's Exhibit A 230, R. 68). He immediately admitted the intercourse but denied the use of force (Petitioner's Exhibit A 59, R. 52).

3. On August 6, 1943 charges were preferred against petitioner under the 92nd Article of War for rape by charge sheet bearing the names of fourteen witnesses against petitioner (Petitioner's Exhibit A 22, R. 68). The charges were on August 6, 1943 referred by the Adjutant General of the Command by a routine military order form reciting "By order of the Commanding General" to one Maj. Julian H. Stark for pre-trial investigation required by Article of War Seventy (Petitioner's Exhibit A 25).

4. The investigating officer interviewed numerous witnesses including those listed on the charge sheet, and took statements from them (Petitioner's Exhibit A 34-78) but failed to investigate the character and reputation of the prosecuting witness in the community for chastity because

such investigation would tend to degrade the prosecuting witness (Petitioner's Exhibit A 27).

5. The investigating officer failed to advise petitioner of his rights under Article of War Seventy (Petitioner's Exhibit A 57, R. 36) and refused to accord him the opportunity to cross-examine witnesses against him who were available. He failed to advise petitioner of the substances of the statements of the American doctor and the substances of the statements of any other witnesses interviewed, except four witnesses whose statements were not damaging (Petitioner's Exhibit A 58). The investigating officer refused to permit the petitioner to examine the prosecuting witness (Petitioner's Exhibit A 58, 27, R. 37).

6. The investigating officer reported the results of his investigation to the Commanding General on August 13, 1943 and before petitioner or his counsel had ever seen the charges or knew that an investigation had been completed (Petitioner's Exhibit A 25-27).

7. On August 15, 1943 the charges were referred to trial as a routine military matter by the Adjutant General of the Command by order bearing the legend "By command of the Brig. Gen. Collins" (Petitioner's Ex. A 23, 110) without commanding officer's certification that investigation had been carried out (Petitioner's Exhibit A 26), rather than the Commanding General personally, after having personally considered the results of the pre-trial investigation for guidance.

8. On August 17, 1943 and more than eight days after petitioner's arrest and confinement on August 3, 1943, and before petitioner had been advised of said investigation or of his rights thereunder, said charges were served on " defense counsel appointed with said court-martial (Petitioner's Exhibit A 23½ top of page).

9. Both the defense counsel and assistant defense counsel appointed with said court-martial notified petitioner that they were non-skilled in the law and could not adequately defend petitioner (R. 28, 29). Petitioner did not see the assistant defense counsel who actively participated in the trial until the day before the trial on August 25, 1943, and saw the defense counsel who did not actively participate in the trial but once before this time (R. 28, 29, 38).

10. Neither the defense counsel nor the assistant defense counsel notified the court-martial, nor the appointing authority, of their inability to adequately prepare and prosecute petitioner's defense, and neither counsel objected to the inadequacy of the pre-trial investigation, nor asked continuance, nor examined available witnesses as to the issue of resistance of the prosecuting witness, nor as to evidence of outcry, nor did they call witnesses requested by petitioner, nor did they call the American doctor as a witness (R. 28-35, Petitioner's Exhibit A 108). Neither the trial Judge Advocate nor defense counsel at the trial disclosed evidence available from the investigation favorable to petitioner on the issue of consent.

11. The court-martial by general sentence convicted petitioner of rape and yet recommended clemency on the ground that the court believed that the incident occurred only because of the encouragement given by the complaining witness over a period of weeks and that on the night in question the accused did not solicit the company of the complaining witness who undoubtedly took the initiative in being in his company (Petitioner's Exhibit A 242).

12. The complaining witness and her mother after sentencing and after they had determined that the complaining witness was not pregnant, admitted in writing that she was partly to blame for the incident (Petitioner's Exhibit A 245, 246).

13. After the court-martial judgment and receipt by the convening officer of admissions from the prosecuting witness of collaboration in the alleged crime, the convening officer, instead of ordering a new trial, caused a post-trial ex-parte investigation to be carried out to determine whether the prosecuting witness would stand by her testimony at the trial which if believed tended to support the finding of guilt by the court (Petitioner's Exhibit B 9), even though the court had stated that it believed the prosecuting witness was partly to blame (Petitioner's Exhibit A 242) and thereby affirmatively indicated that the sentence was predicated upon an erroneous concept of the necessary elements of the crime of rape.

14. The prosecution of the trial and the pre-trial investigation was carried out in collaboration with the British Civil authorities to conform to the convenience of the British authorities (Petitioner's Exhibit A 10) instead of as an impartial judicial proceedings with due respect for the petitioner's constitutional rights to a fair and impartial trial.

II.

JURISDICTIONAL STATEMENT.

A.

Petitioner contends that the Supreme Court of the United States has jurisdiction to review on certiorari in the Circuit Court of Appeals for the Seventh Circuit under Judicial Code, Sec. 240 (a) (June 17, 1934), c. 426, 48 Stat. 926, 28 USCA, Sec. 347 (a); and Sec. 6 (c) (February 13, 1925), c. 229, 43 Stat. 940 as amended June 29, 1938, c. 806, 52 Stat. 1232, 28 USCA, Sec. 463 (c); and the rules of the Supreme Court, Rule 38, c. 5 (b).

B.

The date of the judgment to be reviewed on certiorari is December 19, 1947 (R. 101), and the date upon which the petition for rehearing in the Circuit Court of Appeals on said judgment was denied January 10, 1948 (R. 102). A copy of the opinion of the Circuit Court of Appeals delivered on the rendering of said judgment is included in the Record (R. 97) and reported in 164 Fed. 2d Adv. 722.

C.

The decision of the Circuit Court of Appeals is in conflict with the decisions of the Second, Third and Eighth Circuit Courts in the following cases as indicated in "Reasons Relied on for Allowance of the Writ," hereinbelow in Section IV of this petition.

U. S. v. Bayer (1946, CCA 2), 156 Fed. 2d 964, 969; reversed on grounds irrelevant to the issue herein involved in 331 U. S. 532, 91 L. Ed. (Adv.) 1294;

Innes v. Hiatt (1944, CCA 3), 141 Fed. 2d 664, 665, 666;

VerMehren v. Sirmyer (1929, CCA 8), 36 Fed. 2d 876, 880;

Reilly v. Pescor (1946, CCA 8), 156 Fed. 2d 632, 634, 635, cert. den. 329 U. S. 790.

D.

The decision of the Circuit Court of Appeals decides the following questions of Federal Law which have not been, but because of the national importance of the questions involved should be, decided by this Court.

1. Whether or not in an United States General Court-Martial proceedings, the rights of the accused defined by

Articles of War Seventy with reference to the pre-trial investigation, involves substantial rights of the accused, respect for which is necessary to due process.

2. Whether or not a pre-trial investigation in substantial compliance with Articles of War Seventy is necessary to give the appointing officer authority to refer the matter for trial and thereby give the court-martial jurisdiction of the subject matter to proceed.

3. Whether the Federal Courts of the Judicial Department of the Government, after military reviewing procedures have been completed, may review an Army General Court-martial proceeding involving a friendly United States citizen and concerning a civil as well as a military crime, to determine whether the court-martial judgment is predicated upon substantial error of criminal law as distinct from military law, or denies constitutional rights of the accused as distinct from peculiar military rights.

E.

The decision of the Circuit Court of Appeals decides Federal questions probably in conflict with the following applicable decisions of this Court (these cases are analyzed in the brief filed in support of this petition):

Sabareigo v. Maverick (1887), 124 U. S. 261, 291-296, 31 L. Ed. 430, 442, 443;

French v. Weeks (1921), 259 U. S. 326, 335, 66 L. Ed. 965, 972;

Burke v. Tregre (1874), 86 U. S. (19 Wall.) 519, 526, 22 L. Ed. 158, 159;

Givens v. Zerbst (1921), 255 U. S. 11, 18, 19, 65 L. Ed. 475, 479;

Frank v. Mangum (1914), 236 U. S. 309, 330, 59 L. Ed. 969, 981;

Hawk v. Olson (1945), 326 U. S. 271, 274, 90 L. Ed. 61, 64.

III.

QUESTIONS PRESENTED.

The questions presented to this Court on petition for writ of certiorari are as follows:

A.

Does denial to the accused of the right to cross-examine witnesses against him if they are available, and to examine available witnesses requested by the accused during the pre-trial investigation in an United States Army General Court-Martial proceedings, affect the authority of the convening officer to refer the matter to trial and thereby affect the jurisdiction of the general court-martial over the subject matter of the action?

B.

Does referring charges against the accused to an United States Army General Court-Martial for trial without first having given the accused during a pre-trial investigation the opportunity to cross-examine witnesses against him if they are available and examine available witnesses requested by the accused, deny the accused due process of law guaranteed by the Fifth Amendment of the Constitution of the United States?

C.

Is an accused who is a friendly United States citizen denied the right to submit fundamental errors of criminal law, statutory construction, and constitutional construction in the court-martial proceedings to the Federal Courts of the Judicial Department for ultimate determination of the accused's legal and constitutional rights as distinct from his military rights, because Congress has neither provided nor prohibited a mode of appeal from the gen-

eral courts-martial organized under the Articles of War to the Federal Courts of the Judicial Department of the Government?

D.

Is the burden of proof upon the respondent relying upon the court-martial judgment in habeas corpus proceedings, to prove that the court-martial was appointed and the matter referred to trial by officers authorized by the Articles of War to act only after personally considering the results of an adequate pre-trial investigation for guidance; that the accused was afforded the services of both competent defense counsel and assistant defense counsel if requested; that the accused had a reasonable opportunity to prepare for trial; that the court-martial did not commit substantial error of criminal law as distinct from military law; and that the accused was accorded that basic guarantee of fairness in the court-martial proceedings, including the ex parte military review as contemplated by Amendment 5 of the Constitution of the United States?

IV.

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

Petitioner submits as reasons for the allowance of the writ the following:

A.

The Circuit Court of Appeals rendered a decision in conflict with the decision of the Second Circuit (**U. S. v. Bayer** [1946], CCA 2, 156 Fed. 2d 964, 969) reversed on grounds irrelevant herein (328 U. S. 331); and the Eighth Circuit (**Reilly v. Pescor** [1946], CCA 8, 156 Fed. 2d 632, 634, 635 [cert. den., 329 U. S. 790]) in holding that failure

to investigate the charges in substantial compliance with Articles of War Seventy was immaterial, either on due process or jurisdictional grounds.

The Circuit Court of Appeals' decision that the scope of review was limited to determining that the court-martial was properly constituted, the accused was subject to military law and rape was included in the Articles of War, conflicts with a decision of the Third Circuit Court (**Innes v. Hiatt** [1944], CCA 3, 141 Fed. 2d 664, 665, 666).

The Circuit Court of Appeals' decision conflicts with a decision of the Eighth Circuit Court in deciding that the burden of proof is upon petitioner to disprove the essential elements of the court-martial jurisdiction (**VerMehren v. Sirmyer** [1929, CCA 8], 36 Fed. 2d 876, 880).

B.

The Circuit Court of Appeals in affirming the District Court judgment has decided that substantial compliance with the requirements of Articles of War Seventy as to the pre-trial investigation, is not required either to give jurisdiction to the general courts-martial over the subject matter involved, or to afford the accused due process of law in the court-martial proceedings.

District Courts in the 3rd and 10th circuits have ruled that substantial compliance with Articles of War Seventy is necessary either to give jurisdiction to the courts-martial, or to afford the accused due process of law, or both (**Hicks v. Hiatt**, D. C. M. D. Penn. 1946, 64 Fed. Sup. 238, 248, 249; **Anthony v. Hunter**, D. C. D. Kan. 1947, 71 Fed. Sup. 823, 830, 831). This view is followed by the 2nd and 8th circuits (**U. S. v. Bayer**, 156 Fed. 2d 964, 969; **Reilly v. Pescor**, 156 Fed. 2d 632, 634).

The Judge Advocate General of the Army up until 1943 ruled that the general court-martial was without jurisdic-

tion to proceed on a matter that had not been investigated in substantial compliance with Article of War Seventy (**Digest of Opinions** of the Judge Advocate General of the Army, 1912-1940, p. 292). In 1943 the Judge Advocate General, in a case as to charges to which the accused had pleaded guilty, ruled that compliance with Article of War Seventy was not necessary to give jurisdiction to the court-martial (CM229477 **Floyd**, 17 BR 149, 153). The Judge Advocate General has proceeded from this case to determine in 1947 that Article of War Seventy confers upon the accused no rights, the deprivation of which affects the jurisdiction of the Court to which charges against him are referred for trial (CM323486 **Ruckman**, August 1947).

It is submitted that the Supreme Court will take judicial knowledge of the fact that numerous general courts-martial proceedings have occurred as a consequence of the recent war and that these proceedings have involved numerous United States citizens drafted or volunteered into the army from civilian life, and have involved numerous crimes intrinsically of criminal nature, rather than peculiarly affected with military discipline or military law in the historical sense. Each of these general courts-martial proceedings of necessity involves an application of Articles of War Seventy, and it is apparent that the most recent construction of the effect of Article of War Seventy by the Judge Advocate General of the Army and followed by the Circuit Court of Appeals for the Seventh Circuit is not only inconsistent with the construction of the Circuit Courts of Appeal of the Second and Eighth Circuits and of the District Courts in the Third and Tenth Circuits, but is based on fallacious reasoning.

It is contended by petitioner that this Court should settle the proper construction of the import of Article of War Seventy in order that any prisoners incarcerated under

an erroneous construction thereof may be released with a minimum of trial court litigation and without unnecessary appellate procedures. If the most recent construction of the Judge Advocate General of the Army is correct, this Court should settle that construction in order to forestall futile and unnecessary litigation involving the Seventieth Article of War by the numerous prisoners incarcerated under sentences of general courts-martial proceedings.

C.

Petitioner contends that this Court has defined the status of legislative courts organized under Article I of the Constitution with relation of Federal Courts of the Judicial Department organized under Article III of the Constitution and as distinguished among the legislative courts, those functions concerned with "public rights" from those functions concerned with "private rights."

Wherein fundamental private rights are involved as distinct from privileges based upon sovereign grace, this Court has ruled that the separation of powers and due process concepts of the Constitution require ultimate determination of the questions of law with respect to said rights by Courts of the Judicial Department.

The Supreme Court has recently defined the status of military commissions constituted under Article I of the Constitution when dealing with the international laws of war involving enemy belligerents. The Circuit Court of Appeals has erroneously construed these recent rulings as applicable to courts-martial dealing with criminal law as distinct from military discipline or the laws of war and involving United States citizens and non-enemy belligerents.

Petitioner submits that this Court should define clearly the function of the courts-martial dealing with non-enemy

belligerents and criminal law as distinct from the laws of war, as it dovetails into the Federal Constitutional Government of separated powers and due process as this Court has done in the cases of the various other legislative courts instituted under Article I of the Constitution.

This clarification is necessary in order that unnecessary trial Court habeas corpus litigation and appellate procedures involving the numerous military prisoners sentenced during the recent war by courts-martial may be avoided.

It is contended that due process requires that the Judicial Department of Government determine the legal construction of the necessary elements of rape wherein Congress does not define the term, and that the court-martial record must indicate that the accurate definition was applied to the facts found by the court-martial to be true, or at least must not indicate that an erroneous definition may have been applied in rendering a general finding of guilt.

In the interest of brevity the analysis of this Section C is confined to the brief.

D.

The decision of the Circuit Court of Appeals decides Federal questions probably in conflict with the applicable decisions of this Court cited above in "Jurisdictional Statement," sub-paragraph E thereof, and discussed in the brief filed in support of this petition.

Wherefore, your petitioner prays that a writ of certiorari issue under the seal of this Court directed to the Circuit Court of Appeals for the Seventh Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings

of said Circuit Court of Appeals for the Seventh Circuit had in the case numbered and entitled on its docket "No. 9362, Kenneth M. Waite, petitioner-appellant, v. J. Ellis Overlade, Warden United States Penitentiary, Terre Haute, Indiana, respondent-appellee," to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment herein of said Circuit Court of Appeals be reversed by the Court, and for such further relief in the premises as to this Court may seem proper.

Dated March 25th, 1948.

KENNETH M. WAITE,

By BENJAMIN G. COX,
Counsel for Petitioner.

GILBERT W. GAMBILL,
EATON J. DUDLEY,
Of Counsel.

APPENDIX 1.

Article of War 70.

Art. 70. Charges; Action Upon.—Charges and specifications must be signed by a person subject to military law, and under oath either that he has personal knowledge of, or has investigated, the matters set forth therein and that the same are true in fact, to the best of his knowledge and belief.

No charge will be referred to a general court martial for trial until after a thorough and impartial investigation thereof shall have been made. This investigation will include inquiries as to the truth of the matter set forth in said charges, form of charges, and what disposition of the case should be made in the interest of justice and discipline. At such investigation full opportunity shall be given to the accused to cross-examine witnesses against him if they are available and to present anything he may desire in his own behalf, either in defense or mitigation, and the investigating officer shall examine available witnesses requested by the accused. If the charges are forwarded after such investigation, they shall be accompanied by a statement of the substance of the testimony taken on both sides.

Before directing the trial of any charge by general court-martial the appointing authority will refer it to his staff judge advocate for consideration and advice.

When any person subject to military law is placed in arrest or confinement immediate steps will be taken to try the person accused or to dismiss the charge and release him. Any officer who is responsible for unnecessary delay in investigating or carrying the case to a final conclusion

shall be punished as a court-martial may direct. When a person is held for trial by general court-martial, the commanding officer will, within eight days after the accused is arrested or confined, if practicable, forward the charges to the officer exercising general court-martial jurisdiction and furnish the accused a copy of such charges. If the same be not practicable, he will report to superior authority the reasons for delay. The trial judge advocate will cause to be served upon the accused a copy of the charges upon which trial is to be had, and a failure so to serve such charges will be ground for a continuance unless the trial be had on the charges furnished the accused as hereinbefore provided. In time of peace no person shall, against his objection, be brought to trial before a general court-martial within a period of five days subsequent to the service of charges upon him.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1947.

No. 694

KENNETH M. WAITE,
Petitioner,

vs.

J. ELLIS OVERLADE, Warden United States Penitentiary,
Terre Haute, Indiana,
Respondent.

BRIEF

In Support of Petition for Writ of Certiorari.

BENJAMIN G. COX,
613 Merchants National Bank Bldg.,
Terre Haute, Indiana,
Counsel for Petitioner.

GILBERT W. GAMBILL,
EATON J. DUDLEY,
Terre Haute, Indiana,
Of Counsel.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.

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IN THE

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No. .....

KENNETH M. WAITE,
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Terre Haute, Indiana,
Respondent.

BRIEF

In Support of Petition for Writ of Certiorari.

(Note: All page references to Exhibits are to numbers identified by the trial court reporter's initials "E. W.")

I.

OPINIONS OF THE COURTS BELOW.

The United States District Court for the Southern District of Indiana discharged petitioner's writ of habeas corpus on special findings of fact and conclusions of law by judgment without opinion on December 30, 1946 (R. 69-73).

The United States Circuit Court of Appeals for the Seventh Circuit filed its opinion upon which it affirmed the District Court by judgment December 19, 1947 (R. 97-102).

The opinion of the Circuit Court of Appeals for the Seventh Circuit will be found in the record (R. 97-101) and this opinion is reported in 164 Fed. (2d) 722.

II.

JURISDICTIONAL STATEMENT.

1.

The statutory provisions believed to sustain jurisdiction of the court are Section 240 (a) of the Judicial Code as amended [June 17, 1934, c. 426, 48 Stat. 926, 28 USCA, Sec. 347 (a)]; and Sec. 6 (c), February 13, 1925, c. 229, 43 Stat. 940, as amended June 29, 1938, c. 806, 52 Stat. 1232, 28 USCA, Sec. 463 (c); and the rules of this court, Rule 38, Clause 5 (b).

2.

The date of the judgment to be reviewed on certiorari is December 19, 1947 (R. 101). A petition for rehearing was filed in the Circuit Court of Appeals on January 2, 1948 (R. 102), which was denied without opinion on January 10, 1948 (R. 102).

3.

The decision of the Circuit Court of Appeals for the Seventh Circuit is in conflict with decisions of the second, third and eighth Circuit Courts as indicated below in the argument (Point A, pp. 12-15).

4.

The decision of the Circuit Court of Appeals for the Seventh Circuit decides questions of Federal law discussed below (Points B and C, pp. 15-20) which have not been, but because of the national importance of the questions involved should be, decided by this Court.

5.

The decision of the Circuit Court of Appeals decides Federal questions probably in conflict with the applicable decisions of this Court discussed below (Point D, pp. 21-22).

III.

STATEMENT OF THE CASE.

In this habeas corpus action the following facts summarized and referred to in the petition for the writ of certiorari are particularly invited to the Court's attention:

1. The only evidence concerning the manner of appointing the court-martial (Pet. Ex. A. 101), referring the matter for pre-trial investigation (Pet. Ex. A. 25), referring the matter for trial after investigation (Pet. Ex. A. 23), and ordering the sentence executed [Resp. Ex. 2 (a)] are routine military orders issued by Adjutants or Chiefs of Staff bearing recital legends such as "By order of the Commanding General."

2. The District Court failed to state findings of fact that the matter had been duly investigated before the court-martial trial (R. 67-72) and the Circuit Court of Appeals erroneously stated in its opinion that the District Court had found that the charges were duly investigated before trial [R. 98, 164 Fed. (2d) 722, 723].

3. The investigating officer warned petitioner during the pre-trial investigation of his rights under Article of War 24 (rights against self-incrimination), but failed to advise him of his rights under Article of War Seventy (pre-trial investigation rights) (Pet. Ex. A. 57, R. 36).

4. The investigating officer read statements of four witnesses to petitioner, none of whom had heard an outcry from the scene of the alleged crime, though they were within ear-shot of the scene (Pet. Ex. A. 54, 58, 72, 74) but failed to advise petitioner of the statements taken from damaging witnesses and refused to permit petitioner to cross-examine the girl (Pet. Ex. A. 58, R. 37). It is noted that "J. H. S.", presumably the investigating officer, altered petitioner's statement (Pet. Ex. A. 58).

5. Petitioner did not know that a pre-trial investigation had been carried out until at least after the trial began (R. 36), and he was not advised of Dr. Lampka's statement that the girl's physical condition did not indicate a struggle (Pet. Ex. A. 71) nor was Dr. Lampka called as a witness in the trial either by the Trial Judge Advocate or the defense counsel.

6. Petitioner saw the assistant defense counsel who actively prosecuted his defense only once the day before trial (R. 28, 38) and he saw the defense counsel who did not actively participate in the trial but once before this time (R. 38). Neither defense counsel nor assistant defense counsel asked a continuance, nor advised the court of their incapacity to defend (Pet. Ex. A. 108). Neither defense counsel nor assistant defense counsel exploited the witnesses at trial whose pre-trial statements were relevant to showing failure of the girl to resist (Pet. Ex. A. 47, 55, 56, R. 29-34), nor did they call witnesses requested by the petitioner to show that the girl solicited the company of petitioner (R. 29-34).

7. The court-martial by its clemency recommendation affirmatively shows that it may have disbelieved the girl's testimony as to resistance and yet through misunderstanding that resistance was necessary to the crime, found petitioner guilty (Pet. Ex. A. 242).

8. The convening authority rather than ordering a new trial to be sure that the court-martial in adversary proceedings applied the correct law defining the crime of rape, even after the girl and her mother admitted partial blame (Pet. Ex. A. 245, 246) under circumstances seriously affecting their credibility as witnesses, ordered a post-trial, ex-parte investigation to determine whether the girl would retract her testimony, which **if believed** by the court, could have sustained its finding (Pet. Ex. B. 9).

9. Though petitioner was arrested and confined from August 3, 1943 (Pet. Ex. A. 10, R. 27) and was without counsel until at least August 17, 1943 (Pet. Ex. A. 23½ at top of page) the investigation proceeded in collaboration with the British authorities (Pet. Ex. A. 26-79) who in fact requested and were granted a delay in the trial (Pet. Ex. A. 10).

10. The District Court and the Circuit Court of Appeals, by their judgments on the evidence and issues presented, decided:

(a) That the routine military orders issued by Adjutants based on a presumption that public officers do their duty, prove—first, the identity of the Commanding Officer empowered by law to act; second, the fact that the Commanding Officer personally acted; third, that the Commanding Officer considered the results of an adequate pre-trial investigation for guidance before exercising his discretion in acting; and fourth, that the condition precedent of giving the accused his pre-trial examination rights either existed, or was immaterial.

(b) That the pre-trial investigation requirements of Article of War Seventy are immaterial on habeas corpus because they do not affect the power to convene the court and thereby the jurisdiction of the court-martial, nor does their violation affect due process and thereby constitutional rights of petitioner.

(c) That the Federal Civil Court will not examine General court-martial proceeding dealing with a friendly United States citizen and involving criminal as distinct from military offenses to determine whether errors of law or the proceedings in the aggregate result in denial of petitioner's liberty without due process of law.

IV.

SPECIFICATION OF ERRORS.

1. The trial court erred in refusing to state findings of fact as to whether or not the pre-trial investigation rights required by Article of War Seventy were afforded petitioner, and the Circuit Court of Appeals erred in stating in its opinion that the trial court had found that petitioner's case had been duly investigated.

2. The trial court and the Circuit Court of Appeals erred in determining that the court-martial record is presumed to be regular, wherein it fails to affirmatively and unequivocally show each statutory step in instituting the court-martial.

3. The trial court and the Circuit Court of Appeals erred in refusing to consider the affirmative showing in the court-martial record that the court-martial may not have applied the correct criminal law (as distinct from military law) defining the crime of rape.

4. The trial court and the Circuit Court of Appeals erred in failing to examine the court-martial proceedings behind the court-martial judgment to assess the fairness of the entire proceedings as an impartial and thorough adversary judicial proceedings to elicit facts, both in prosecution and defense of petitioner, rather than to "formally convict" the accused.

V.

SUMMARY OF ARGUMENT.

POINT A.

1. The decision of the Circuit Court of Appeals for the Seventh Circuit that the question of compliance with the requirements of Article of War Seventy as to pre-trial investigation is immaterial, conflicts with the decisions of the second Circuit Court of Appeals in **U. S. v. Bayer** (1946 CCA 2), 156 Fed. (2d) 964, 969, reversed on other grounds (329 U. S. 706); and of the Eighth Circuit Court in **Reilly v. Pescor** (1946 CCA 8), 156 Fed. (2d) 632, 634, 635, cert. den. 329 U. S. 790.

2. The decision that the Federal Civil Court will not examine the entire court-martial proceedings on habeas corpus behind the court-martial judgment to determine the fundamental basis of restraint of liberty beyond an examination of the technical military status of the person, the formal institution of the court, and the nature of the offense tried, conflicts with the decision of the Third Circuit Court in **Innes v. Hiatt** (1944 CCA 3), 141 Fed. (2d) 664, 665, 666.

3. The decision that legal presumptions will be resorted to to supplement the court-martial record on contested issues involving jurisdictional facts, conflicts with the decision of the Eighth Circuit Court in **VerMehren v. Sirmyer** (1929 CCA 8), 36 Fed. (2d) 876, 880, and with the decisions of this Court in **Collins v. McDonald** (1922), 258 U. S. 416, 418, 66 L. Ed. 692, 695, and **Givens v. Zerbst** (1921), 255 U. S. 11, 19, 65 L. Ed. 475, 479.

POINT B.

Inasmuch as the effect of the requirements of Article of War Seventy on the validity of general court-martial judg-

ments involves numerous persons convicted during the recent war, and involves the proper administration of military justice by the War Department, the conflicts of construction of Article of War Seventy by the second, seventh and eighth Circuit Courts of Appeal and District Courts of the third and tenth circuits and an earlier opinion as compared with the current opinions of the War Department, should be set at rest by this Court as a matter of national importance.

POINT C.

1. This Court has had occasion to state in numerous instances that in habeas corpus proceedings involving court-martial judgments, the only questions to be determined are whether the court-martial had jurisdiction of the person of the defendant and of the offense charged, and whether the sentence was imposed within the scope of the court-martial's lawful powers.

Carter v. McClaughry (1901), 183 U. S. 365, 401, 46 L. Ed. 236, 253;

Collins v. McDonald (1921), 258 U. S. 416, 418, 66 L. Ed. 692, 695.

2. The above proposition is predicated upon the distinction between the determination of questions of military law under Article 1 of the Constitution and the exercise of the judicial power under Article 3 of the Constitution.

Ex Parte Vallandigham (1863), 68 U. S. (1 Wall.) 243, 17 L. Ed. 593;

Dynes v. Hoover (1857), 61 U. S. (20 How.) 65, 15 L. Ed. 838;

Smith v. Whitney (1885), 116 U. S. 167, 29 L. Ed. 601, 604.

3. The exercise by Congress of judicial power incident to legislative power under Article 1 of the Constitution is

predicated upon British common law authority not applicable except as to peculiar legislative or military offenses.

Kilbourn v. Thompson (1880), 103 U. S. (13 Otto) 168, 26 L. Ed. 377;

Ex Parte Vallandigham (1863), 68 U. S. (1 Wall.) 243, 17 L. Ed. 593;

Smith v. Whitney (1885), 116 U. S. 167, 29 L. Ed. 601, 604.

4. The historic common law crimes against the United States such as rape or murder, involve but one crime under the judicial power unless a peculiar military offense such as scandalous conduct be also charged, whether the crimes be charged under the Articles of War or Criminal Code.

Grafton v. U. S. (1906), 206 U. S. 333, 352, 51 L. Ed. 1085, 1090;

Ex Parte Mason (1882), 105 U. S. (15 Otto) 696, 26 L. Ed. 1213;

Ex Parte Quirin (1942), 317 U. S. 1, 43, 87 L. Ed. 3, 21.

5. This Court has recently indicated the constitutional basis of the authority of military tribunals proceedings and disclosed the distinctions between the various types of military tribunals existent, the distinctions between the gravamens of the various offenses committed to military tribunals, and the distinctions between the constitutional rights of the various types of persons over which military tribunals exercise jurisdiction.

Ex Parte Quirin (1942), 317 U. S. 1, 43, 87 L. Ed. 3, 21;

In re Yamashita (1945), 327 U. S. 1, 90 L. Ed. 499.

6. Petitioner contends that regardless of the broad general dicta appearing in the earlier cases, this Court has

never squarely had occasion to determine that a friendly United States citizen, though he may be subject to reasonable discriminatory regulations or procedures, is not entitled as a matter of due process to ultimate adjudication by the Judicial Department of the Government of his right to personal liberty upon the charge of the historic common law crime of rape wherein it affirmatively appears that the court-martial may not have applied the legal definition of the crime.

POINT D.

The decision of the Circuit Court of Appeals decides Federal questions probably in conflict with applicable decisions of the United States Supreme Court outlined in the argument.

VI.

ARGUMENT.

POINT A.

1.

Petitioner by his proposed special findings of fact in the District Court and his motion in the alternative for additional findings of fact or for a new trial, requested that the District Court state findings concerning whether the pre-trial investigation including petitioner's right to cross-examine witnesses against him who were available as required by Article of War Seventy, was carried out. The District Court failed and refused to make findings as to pre-trial investigation, and this error was urged in the Circuit Court of Appeals on appeal.

The Circuit Court of Appeals erroneously stated in its opinion that the District Court had found that the matter had been duly investigated before the court-martial trial, but it denied petitioner's petition for rehearing which submitted this error to the Circuit Court of Appeals, and it affirmed the District Court. Therefore, the Circuit Court of Appeals has decided that the requirements of Article of War Seventy as to the pre-trial investigation are immaterial in these habeas corpus proceedings.

In **U. S. v. Bayer** (1946 CCA 2), 156 Fed. (2d) 964, 969, the Circuit Court of Appeals for the second circuit held that a confession exacted from the accused in violation of the requirements of Article of War Seventy, was not admissible in the trial. The Supreme Court reversed the second circuit (329 U. S. 706) not on the ground that the construction by the second circuit of the effect of Article of War Seventy was erroneous, but on the ground that a second confession exacted from the accused at a later date without violating Article of War Seventy was

admissible and it was the second confession which had been admitted at trial.

In **Reilly v. Pescor** (1946 CCA 8), 156 Fed. (2d) 632, 634, 635, cert. den. 329 U. S. 790, the Circuit Court of Appeals for the eighth circuit held that the court-martial acquired no jurisdiction of the subject matter of charges which had not been investigated in substantial compliance with Article of War Seventy, but that because there were nine charges (out of thirteen involved) which had been investigated, the general sentence of the court-martial was authorized on these nine charges.

The decision of the Circuit Court of Appeals for the Seventh Circuit therefore conflicts with the decisions of the second and eighth circuits in holding that compliance with Article of War Seventy is immaterial in determining either whether the court-martial acquired jurisdiction of the subject matter involved, or the accused was accorded due process of law, by incarceration without pre-trial investigation.

2.

The Circuit Court of Appeals for the third circuit in **Innes v. Hiatt** (1944 CCA 3), 141 Fed. (2d) 664, 665, 666, recognizes the recent judgments of the Supreme Court holding that the Civil Courts on habeas corpus under the statute [28 USCA 461 (a)] must inquire wherein constitutional rights of the accused are involved into the basic cause of restraint, regardless of the judgments of the convicting courts within the scope of their jurisdiction. The third circuit court states that though due process for military personnel in court-martial proceedings may involve process different from civil process, the Fifth Amendment of the Constitution requires application of the military process in a fundamentally fair and impartial manner and that the Civil Court on habeas corpus may investigate the manner of court-martial proceedings.

The Circuit Court of Appeals for the Seventh Circuit by an erroneous application of the Supreme Court's opinion in the case of **In re Yamashita** (1945), 327 U. S. 1, 90 L. Ed. 499, which was concerned with military commissions trying enemy belligerent for offenses defined by the international laws of war, decided that the Federal Civil Court on habeas corpus proceedings involving the judgment of an Army General court-martial trying a friendly United States citizen for a crime of historical civil nature, is limited to determining the lawful power of the court-martial to try the petitioner for the offenses charged.

This decision of the Circuit Court of Appeals, therefore, conflicts with the decision of the Third Circuit Court of Appeals and with the decisions of the Supreme Court such as **Frank v. Mangum** (1914), 237 U. S. 309, 330, 59 L. Ed. 969, 981, and more recent cases.

3.

The decision of the Circuit Court of Appeals that petitioner has failed to prove that the court-martial was improperly instituted, or that he was not accorded an adequate pre-trial investigation, or that the court-martial proceedings were unfair wherein the only evidence introduced was the court-martial record and the testimony of petitioner on these issues, casts the burden of ultimate proof of these issues upon petitioner and predicates respondent's rebuttal upon a presumption that the court-martial record is regular even though it is incomplete, and affirmatively shows facts consistent with petitioner's allegations. This decision conflicts with the decision of the Circuit Court of Appeals for the Eighth Circuit in **Ver Mehren v. Sirmyer** (1929 C. C. A. 8), 36 Fed. (2d) 876, 880, and with the decisions of the Supreme Court in **McClaughry v. Deming** (1901), 186 U. S. 49, 46 L. Ed. 1049; **Collins v. McDonald**

(1922), 258 U. S. 416, 418, 66 L. Ed. 692, 695; **Givens v. Zerbst** (1921), 255 U. S. 11, 19, 65 L. Ed. 475, 479, and **Sabareigo v. Maverick** (1887), 124 U. S. 261, 291-293, 31 L. Ed. 430, 442, 443.

POINT B.

Whether or not the requirements of Article of War Seventy that no matter shall be referred to general courts-martial for trial without first having completed a pre-trial investigation in which the accused is given the opportunity to present evidence in his behalf and examine witnesses against him, affects the authority of the appointing officer to convene a general court-martial without being guided by the results of a adequate pre-trial investigation, involves a question of Federal law of grave and national import.

District Courts in the Third and Tenth Circuits (**Hicks v. Hiatt** [1946], D. C. M. D. Penn., 64 Fed. Sup. 238; **Anthony v. Hunter** [1947], D. C. D. Kans., 71 Fed. Sup. 823) have ruled that substantial compliance with the pre-trial investigation requirements of Article of War Seventy is necessary either to give jurisdiction of the subject matter to the courts-martial, or to comply with the due process requirements of the Fifth Amendment of the Constitution. This view is followed by the Second and Eighth Circuit Courts of Appeal, as indicated in the cases of **U. S. v. Bayer** (1946 C. C. A. 2), 156 Fed. (2d) 964, and **Reilly v. Pescor** (1946 C. C. A. 8), 156 Fed. (2d) 632.

The Judge Advocate General of the Army, formerly and until 1943, was of the opinion that the general courts-martial did not acquire jurisdiction of the subject matter on a matter referred to it for trial without having first been investigated in substantial compliance with Article of War Seventy (**Digest of Opinions of the Judge Advocate General of the Army** [1912-1940], p. 292).

In 1943 the Judge Advocate General, in a case in which the accused had pleaded guilty as to certain charges, ruled that pre-trial investigation under Article of War Seventy was not necessary to give jurisdiction to the court-martial and the Judge Advocate General disapproved the sentence except to the extent that the accused had pleaded guilty (C. M. 209477 **Floyd**, 17 BR 149, 153).

The Judge Advocate General more recently, in August, 1947 (C. M. 323486, **Ruckman**), has ruled that Article of War Seventy confers upon the accused no rights, the deprivation of which affects the jurisdiction of the courts-martial, and that the courts-martial do not have the function to try and determine whether the appointing authority in the exercise of his power to refer a case for trial, has breached the bounds set forth by Article of War Seventy. The Judge Advocate General now rules that the sufficiency of the pre-trial investigation is a matter of concern to the accused and to the appointing authority, and that the accused is limited to complaint filed against the appointing authority if he believes the appointing authority has violated his rights under Article of War Seventy, but that the court-martial proceedings are unaffected thereby.

This argument of the Judge Advocate General is obviously fallacious and will be discussed if certiorari is granted.

In view of the numerous prisoners incarcerated under General Courts-Martial judgments, each of which of necessity involved the proper construction of the effect of Article of War Seventy, and most of which involve prisoners who were civilians drafted or volunteered into military service, it is submitted that this Court should settle the proper construction of Article of War Seventy and reconcile the conflict in the earlier and later opinions

of the Judge Advocate General and of the second, seventh and eighth circuits and of the District Courts in the third and tenth circuits. The prisoners incarcerated erroneously should be discharged without the necessity of further appellate litigation or the Federal Courts should be relieved of the unnecessary burden of futile trial court litigation involving Article of War Seventy.

POINT C.

This Court has in many instances determined the status of legislative courts as contrasted with constitutional courts organized under Article 3 of the Constitution concerning the type of judicial power exercised by these legislative courts. The Court of Customs and Appeals is considered in the cases of **Ex Parte Bakelite Corporation** (1928), 279 U. S. 438, 73 L. Ed. 789, and **U. S. v. Sherman & Sons** (1914), 237 U. S. 146, 59 L. Ed. 883. The Court of Claims is considered in the case of **Williams v. U. S.** (1932), 289 U. S. 553, 77 L. Ed. 1382; Employees' Compensation Commission is considered in **Crowell v. Benson** (1931), 285 U. S. 22, 76 L. Ed. 598; Board of Immigration Appeals is considered in **Bridges v. Wixon** (1944), 326 U. S. 135, 89 L. Ed. 2103; Territorial Courts were first considered in **American & Ocean Insurance Company v. 356 Bales of Cotton** (1828), 1 Peters 511, 7 L. Ed. 242, and the Federal Radio Commission was considered in **Federal Radio Commission v. Nelson Bros. Co.** (1932), 289 U. S. 266, 77 L. Ed. 1167; and the Federal Courts of the District of Columbia were considered in **O'Donoghue v. U. S.** (1932), 289 U. S. 516, 77 L. Ed. 1356.

In the above cases the proposition is established that any issue involving the construction of a statute, or the determination of the law involved, is a judicial issue, but that only those judicial issues defined and contemplated by Article 3 of the Constitution of necessity must be com-

mitted to the constitutional courts established by Congress under the power given to Congress by Article 3 of the Constitution. Judicial issues contemplated under the other Articles of the Constitution may be committed to courts other than constitutional courts established under Article 3 of the Constitution.

It is noted that the territorial courts though they be legislative courts organized under Article 4 of the Constitution, do consider judicial issues (Maritime jurisdiction and Criminal jurisdiction) of the type defined by Article 3 of the Constitution because these courts are concerned with cases or controversies arising in the territories and outside of the constitutional confines of those states and persons contemplated as the United States and its citizens under Article 3 of the Constitution. **American & Ocean Insurance Company v. 356 Bales of Cotton** (1828), 1 Peters 511, 7 L. Ed. 242; **Williams v. U. S.** (1932), 289 U. S. 553, 77 L. Ed. 1382.

Thus the power of Congress under Article 4 of the Constitution is a plenary power to the extent that it does not conflict because of the persons or territorial jurisdiction involved with respect to the territorial courts with the judicial power defined under Article 3 of the Constitution.

Though it has long been established by general proposition not confined to the particular circumstances of each case that the constitutional courts could not acquire or be given jurisdiction of judicial issues not defined by Article 3 of the Constitution, this Court has distinguished between those judicial issues susceptible of the exercise of the judicial power under Article 3 and those judicial issues required to be exercised under the judicial power of Article 3 and permitted the courts organized under Article 3 to take jurisdiction of both types of judicial issue. **Murray v. Hoboken Land & Improvement Company** (1885), 59 U. S. (18 How.) 272, 15 L. Ed. 373; **Crowell v. Benson** (1931), 285 U. S. 22, 76 L. Ed. 598.

This Court has recently also determined that constitutional courts organized under Article 3 of the Constitution must consider judicial issues involving judicial power under Article 3 of the Constitution and if these particular constitutional courts were also organized under Congressional power of other Articles of the Constitution, they may also consider judicial issues not susceptible of judicial determination by constitutional courts in general organized under Article 3 of the Constitution. **O'Donoghue v. U. S.** (1932), 289 U. S. 516, 77 L. Ed. 1356.

Thus it is established that though constitutional courts organized under Article 3 must ultimately consider all judicial issues involving the judicial power under Article 3, Congress may establish courts under dual or multiple power granted to Congress by both Article 3 and other Articles as long as there is reserved to the constitutional courts the ultimate duty of determining those judicial issues defined under Article 3.

Wherein the judicial power under Article 3 is involved, this Court has determined that it will review, even the discriminatory acts of military officers who are acting within the scope of their jurisdiction, conferred through Congress under Article 1 of the Constitution, or through legislators of the states under State Constitutions. **Hirabayashi v. U. S.** (1942), 320 U. S. 81, 87 L. Ed. 1774; **Sterling v. Constantin** (1932), 287 U. S. 378, 77 L. Ed. 375.

Inasmuch as rape is a crime the penalties of which involve the personal liberty of the defendant, and this Court has defined the characteristics of the crime of rape and indicated that the penalty should not be imposed unless it clearly indicates that the facts have been unequivocally proved (**Mills v. U. S.** [1896], 164 U. S. 644, 41 L. Ed. 584), petitioner contends that as this Court has done in the case of the legislative courts cited above and

in the case of the Courts of the District of Columbia, it should clarify the status of Army General Courts-martial.

The Army General Courts-martial is a legislative court organized under Article 1 of the Constitution, but to which of necessity Congress has committed jurisdiction over the persons of friendly United States citizens and of subject matter involving the judicial power over the personal liberty of friendly United States citizens as a consequence of historic common law crimes against the United States contemplated as part of the judicial power defined by Article 3 of the Constitution.

Congress has also committed to court-martial jurisdiction over both friendly United States citizens and enemy belligerents of the judicial issues involving the laws of war and peculiar military offenses not part of the judicial power of the Government contemplated by Article 3 of the Constitution.

The military procedures in conformity with the Articles of War are due process for military personnel and discrimination between military personnel and civilian personnel as to procedures is a reasonable discrimination (**Hirabayashi v. U. S.** [1942], 320 U. S. 81, 87 L. Ed. 1774). Petitioner contends, however, this Court should determine that the friendly United States citizen, as to crimes contemplated in the historic common law sense under Art. 3 of the Constitution, is entitled to ultimate or final determination by the Constitutional Courts and that failure of Congress to provide a mode of review, except habeas corpus, indicates that this Court should review the interpretation of Article of War 92 in defining the crime of rape by the court-martial.

POINT D.

The case of **Burke v. Tregre** (1874), 86 U. S. (19 Wall.) 519, 526, 22 L. Ed. 158, 159, holds that the court will not take judicial knowledge of the execution and import of military orders issued by military commander in performance of his military duties. The cases of **Sabareigo v. Maverick** (1887), 124 U. S. 261, 291-296, 31 L. Ed. 430, 442, 443, and **French v. Weeks** (1921), 259 U. S. 326, 335, 66 L. Ed. 965, 972, together hold that a public document, even though it be issued by the public officer who has the duty of issuing the document, is not evidence of recitals in the document of facts, circumstances or acts of other public officers involving the exercise of judicial or discretionary power.

The Circuit Court of Appeals for the Seventh Circuit in affirming the District Court which held that the orders issued by Adjutants and Chiefs of Staff were evidence wherein they recited "By command of Brig. Gen. Collins"; that Brig. Gen. Collins personally had ordered the matter investigated and that he personally had considered the results of an adequate pre-trial investigation for guidance, conflicts with the decisions of the Supreme Court in the above three cases. The Circuit Court of Appeals decision conflicts with these Supreme Court cases also in holding that the orders issued by the Adjutants reciting "By order of Col. Vaughan" was evidence that Col. Vaughan was the Commanding Officer of Western Base Section authorized to act.

The case of **Givens v. Zerbst** (1921), 255 U. S. 11, 18, 19, 65 L. Ed. 475, 479, indicates that the burden of proof is upon the party in habeas corpus proceedings involving a court-martial judgment who relies upon the court-martial judgment to prove all essential elements of the court-martial's authority to act and that evidence may and

should be introduced to supplement the court-martial record by the party with the burden of proof wherein the court-martial record is incomplete, or contested. The cases of **Frank v. Mangum** (1914), 237 U. S. 309, 330, 59 L. Ed. 969, 981, and **Hawk v. Olson** (1945), 326 U. S. 271, 274, 90 L. Ed. 61, 64, hold that the Federal Court on habeas corpus is not limited by the judgment of another court of general jurisdiction from going behind the record to determine whether the errors committed by the court infected the fairness of the trial and thereby denied the defendant due process.

The Circuit Court of Appeals in limiting its inquiry to the jurisdiction of the court-martial over the person of the defendant and the subject matter of the offense charged under the Articles of War and of the extent of sentence imposed, conflicts with the decisions of the Supreme Court in these two cases.

VII.

CONCLUSION.

In view of the conflict between the decision of the Circuit Court of Appeals for the Seventh Circuit and decisions of the second, third and eighth circuits, and in view of the national importance of the questions involved, and in view of the questions involved which have not been, but which ought to be, decided by this Court in the interest of uniformity and certainty, petitioner prays that his petition for writ of certiorari be granted.

BENJAMIN G. COX,
Counsel for Petitioner.

GILBERT W. GAMBILL,
EATON J. DUDLEY,
Of Counsel.

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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 694

KENNETH M. WAITE, PETITIONER

v.

J. ELLIS OVERLADE, WARDEN,
UNITED STATES PENITENTIARY,
TERRE HAUTE, INDIANA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 97–101) is reported at 164 F. 2d 722. The findings of fact and conclusions of law of the district court (R. 67–73) are not reported.

JURISDICTION

The judgment of the circuit court of appeals was entered December 19, 1947 (R. 101–102). A petition for rehearing was denied January 10, 1948 (R. 102). The petition for a writ of certiorari was filed March 25, 1948. The jurisdiction

of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether, where the record shows substantial compliance with the investigatory procedure required by Article of War 70, irregularities in the pre-trial procedure will permit collateral attack by way of habeas corpus on a conviction by court-martial.

2. Whether a habeas corpus court may inquire into the sufficiency of the evidence to support a conviction by court-martial.

3. Whether petitioner's trial by court-martial was fair.

4. Whether respondent was required affirmatively to show the authority of the officer convening the court-martial where petitioner made no showing of the lack of such authority.

STATUTE INVOLVED

The 70th Article of War, as amended (10 U. S. C. 1542), provides in pertinent part as follows:

> No charge will be referred to a general court martial for trial until after a thorough and impartial investigation thereof shall have been made. This investigation will include inquiries as to the truth of the matter set forth in said charges, form of charges, and what disposition of the case should be made in the interest of

justice and discipline. At such investigation full opportunity shall be given to the accused to cross-examine witnesses against him if they are available and to present anything he may desire in his own behalf either in defense or mitigation, and the investigating officer shall examine available witnesses requested by the accused. If the charges are forwarded after such investigation, they shall be accompanied by a statement of the substance of the testimony taken on both sides.

Before directing the trial of any charge by general court martial the appointing authority will refer it to his staff judge advocate for consideration and advice.

STATEMENT

In August 1943, petitioner, a private in the Army, was tried by court-martial on a charge of rape in violation of the 92d Article of War, 10 U. S. C. 1564 (CM 107–109).[1] The record of the trial shows that the only disputed issue was whether complaining witness was subjected to force as she testified (CM 113–115), or whether she consented, as petitioner claimed, in preliminary statements to investigating officers (CM 57, 60), and at the trial (CM 204). The charge of force was corroborated by testimony that the

[1] A record of petitioner's trial by court-martial was introduced in evidence as Exhibit A (R. 41). References to that record are designated by "CM" and the page references are to the numbers in the lower left-hand corner followed by the initials "E. W."

complaining witness sought the aid of an R. A. F. guard immediately after she ran away from petitioner (CM 161, 164), and by evidence of her physical condition when she was examined at the police station to which she was taken that evening (CM 128–130).

Petitioner was found guilty and sentenced to imprisonment for life, the minimum sentence required by AW 92 (CM 230). Thereafter, the members of the court-martial recommended clemency, expressing the opinion that the incident would not have happened except for encouragement given by the complaining witness during preceding weeks (CM 242). The reviewing authority approved the sentence, but reduced the period of confinement to 20 years (CM 9). The record of the trial was reviewed pursuant to AW 50½ (10 U. S. C. 1522) and held legally sufficient (CM 3–8). Petitioner's sentence was subsequently reduced to 15 and then to 10 years (R. 98, n. 2).

In September 1946, petitioner, who was confined in the United States Penitentiary at Terre Haute, Indiana, filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of Indiana, attacking the validity of his conviction. He alleged that the court-martial had been illegally invoked, that the investigatory procedure prescribed by AW 70 had not been followed, and that he had been inadequately represented by defense counsel (R.

2–5). The writ issued, and a hearing was held at which petitioner testified (R. 26–27) and at which the record of the court-martial was introduced in evidence (Ex. A, R. 41).

Petitioner testified that, when he was interviewed on the charges, he was told that he would not be allowed to talk to witnesses (R. 37). The record of the court-martial contains a report of the preliminary investigation (CM 24–81), including the statement made by petitioner to the investigating officer (CM 57–58). The record of that interview shows that petitioner stated that he would like to talk with the complaining witness, and that he was told that he could see her only in the presence of the civil police and witnesses, that it was against the rules of British law to have an interview under any other circumstances. He replied, "I do not wish to see her then" (CM 58). The record also shows that petitioner was shown the statements of a number of witnesses, and that he stated that he did not wish to question them (CM 58).

Petitioner also testified that his defense counsel did not participate in the trial, that he did not see assistant defense counsel until the day before the trial, and that the assistant defense counsel did not properly cross-examine witness (R. 28, 32–35). The court-martial record shows affirmatively that petitioner's chief defense counsel had interviewed one witness (CM 217), and that another witness was called for the defense

(CM 196). It also shows that petitioner stated that defense counsel had explained to him his rights about making a statement and taking the stand (CM 202). The record also shows that assistant defense counsel acted as trial counsel, and took an active part in the trial, making frequent objections to questions (e. g. CM 116–121, 162, 172).

The district judge found that petitioner's trial "was in all respects conducted in the manner and form and in compliance with the Articles of War" and that "the rights and defense of petitioner were actively asserted" (R. 72). He concluded that petitioner was lawfully in custody and ordered that the writ of habeas corpus be discharged (R. 73).

On appeal the judgment of the district court was affirmed (R. 101–102).

ARGUMENT

1. Petitioner contends (Pet. 11–12, 13, 14–17; Br. 7, 12–14, 15–17) that the pretrial investigatory procedure prescribed by AW 70 was not followed, and that such noncompliance served to deprive the court-martial of jurisdiction to try petitioner. The record plainly shows, however, that there was substantial compliance with the provisions of AW 70. It is clear from the record of petitioner's interview with the investigatory officer (CM 57–58) that he was informed of the nature of the accusation against him. He was

asked whether he desired to see the complaining witness and, although he at first said he wished to see her, he changed his mind when he learned that witnesses to such an interview would be required under British law (CM 58). AW 70 provides for cross-examination of witnesses by the accused "if they are available," and obviously British civilian witnesses would be available only under conditions permitted by British law. Significantly, as to all American witnesses, except the doctor who made the physical examination, i. e., the witnesses who were available, petitioner was specifically asked if he wished to examine the witnesses and he affirmatively stated that he did not care to do so (CM 58). The circuit court of appeals was therefore clearly correct in stating that (R. 101), "If there was any relaxation of pretrial investigation requirements not waived by appellant (and we are not convinced that there was), it certainly was not of a nature seriously to impair any of his fundamental constitutional rights."[2]

Under these circumstances, it is clear that petitioner has failed to support his contentions that there was such noncompliance with Article of War 70 which would deprive the court-martial

[2] The district court did not make a specific finding as to compliance with AW 70, but its finding, that petitioner's trial was in all respects conducted in compliance with the Articles of War (R. 72), is sufficiently broad to include a finding of compliance with AW 70. In any event, the facts set forth above appear in the court-martial record which is in evidence.

of such jurisdiction. Even if a serious prejudicial defect in the pretrial investigation would be deemed to be a jurisdictional defect, as held by the cases on which petitioner relies (Pet. 15, Br. 15), that question is not present in this case, since substantial compliance was clearly shown. If there was any defect in the investigatory procedure at all, and we submit that there was none, it was a mere irregularity which would in no way affect petitioner's rights. Such an irregularity would no more oust the court-martial of jurisdiction than an irregularity in the impaneling of a grand jury would invalidate a conviction by a civil court. See *Kaizo* v. *Henry,* 211 U. S. 146; *Harlan* v. *McGourin,* 218 U. S. 442, 451; *United States ex rel. McCann* v. *Thompson.* 144 F. 2d 604 (C. C. A. 2), certiorari denied, 323 U. S. 790. Just as the indictment is the prerequisite to criminal proceedings in a federal district court, so the military charges and specifications are the foundation of a prosecution before a court-martial. The cases cited show that one convicted in a district court does not go free because of irregularities in the accusation; as the Second Circuit said (144 F. 2d at 608), "Nothing could more effectively defeat the interests of justice." Similarly, a person convicted after a legal trial before a general court-martial does not escape punishment because of irregularities in the pretrial investigation.

The investigation prescribed by AW 70 is in no sense jurisdictional, as is significantly demonstrated by important differences in the investigating procedure and the trial itself. Thus, while counsel must be appointed for an accused on trial before a general and a special court-martial (AW 11; 10 U. S. C. 1482), and individual counsel may be employed to conduct the defense at the trial (AW 17; 10 U. S. C. 1488; par. 45a, MCM), a person simply under charges is not entitled to counsel at the pretrial investigation. *Romero* v. *Squier,* 133 F. 2d 528 (C. C. A. 9), certiorari denied, 318 U. S. 785. Similarly, while compulsory process is available to secure the attendance of witnesses at a trial by general court-martial (AW 22; 10 U. S. C. 1493), process which is enforcible by prosecution in the civil courts (AW 23; 10 U. S. C. 1494), there is no such facility for obtaining testimony at the pretrial investigation. It would be surprising to suggest that Congress intended to make jurisdictional a preliminary to trial which was left unprovided with any sanctions to compel testimony. Similarly, in England, where the present trial took place, English law provided for the compulsory attendance of civilian witnesses before American courts-martial, but not before American pretrial investigating officers. See 1 Statutory Rules and Orders, 1942, pp. 849–850; cf. United States of America (Visiting Forces) Act, 1942, St. 5 & 6 Geo. VI, c. 31.

The fact of the matter is that, so long as there was an investigation in fact—i. e., so long as the charges were not referred for trial without the intervention of any investigating officer—irregularities in the pretrial investigation have never been considered jurisdictional. Congress did not so consider them when, in 1937, it amended AW 70 to dispense with investigations prior to trial by summary and special courts-martial. Act of August 20, 1937, c. 716, 50 Stat. 724; see H. Rep. 1517, S. Rep. 65, 75th Cong., 1st sess. Those reports are far from suggesting that Congress thought it was eliminating a jurisdictional prerequisite to trials by inferior courts-martial.

And Congress still does not consider the pretrial investigation jurisdictional. See H. Rep. 2722, 79th Cong., 2d sess., p. 3, recommending that AW 70 be amended to make noncompliance therewith a jurisdictional error; H. Rep. 1034, 80th Cong., 1st sess., p. 7, recommending against making noncompliance with AW 70 a jurisdictional defect. Both reports, though their recommendations differ diametrically, join in recognizing that noncompliance is not now a jurisdictional error.

The Judge Advocate General of the Army has repeatedly held that noncompliance with the pertinent provisions of AW 70 does not affect the jurisdiction of a general court-martial. CM

229477 (*Floyd*) 17 B. R. 149, 153; CM ETO 6694 (*Wornock*), 17 B. R. (E. T. O.) 163, 179; CM ETO 4570 (*Hawkins*), 13 B. R. (E. T. O.) 57, 71–75; CM 323486 (*Ruckman*). And other circuits have held that, absent a showing of vitiating unfairness at the actual trial, the provisions of AW 70 are not jurisdictional. *Thompson* v. *Sanford,* 163 F. 2d 830 (C. C. A. 5), certiorari denied, March 15, 1948, No. 163 Misc., this Term; *Exkano* v. *Sanford,* 165 F. 2d 435 (C. C. A. 5), pending on petition for certiorari, No. 374 Misc., this Term.[3] Here there are concurrent findings by two civil courts that the trial was a fair one.

The other cases relied on by petitioner do not establish any conflict. The rationale of the court below is in entire accord with that of the Third Circuit in *United States ex rel. Innes* v. *Hiatt,* 141 F. 2d 664, a case which did not involve AW 70. The present point was not passed on either by the Second Circuit or by this Court in *United States* v. *Bayer,* 156 F. 2d 964, reversed on other grounds, 331 U. S. 532. And *Reilly* v. *Pescor,* 156 F. 2d 632 (C. C. A. 8), certiorari denied 329 U. S. 790, is not

[3] *Hicks* v. *Hiatt,* 64 F. Supp. 238 (M. D. Pa.), apparently to the contrary, is actually dictum throughout. The opinion was filed after the case had become moot by reason of inadvertent discharge of the petitioner. *Anthony* v. *Hunter,* 71 F. Supp. 823 (D. Kan.), also apparently to the contrary, really proceeds on the basis of fundamental and vitiating unfairness at the actual trial. On any other basis, it cannot, in face of the authorities collected above, be supported.

a square holding on the present point, if indeed it rises to the dignity of dictum.

2. Petitioner's contention that the court-martial applied an erroneous standard of guilt in adjudging the crime of rape (Pet. 13–14; Br. 17–20) is merely an attempt to have the habeas corpus court review the sufficiency of the evidence to support his conviction. That manifestly is not a question which may be reached by habeas corpus. *In re Yamashita,* 327 U. S. 1, 7–8, 17, and cases cited; *Grafton* v. *United States,* 206 U. S. 333, 345–348. Moreover, the record shows that the only disputed issue was the question of force, and that there was ample evidence to support the findings of guilty.

3. Petitioner's contention that he was denied a fair trial (Pet. 14, Br. 7) is, as both courts below found (R. 72, 101), wholly without merit. The court-martial record affirmatively shows that he was adequately represented by counsel and that the trial was fair and regular in all respects.

4. Petitioner also contends that the court below erred in failing to require the respondent to show that the court-martial was legally constituted (Pet. 14, Br. 7, 14–15, 21–22). He apparently argues that the legend on the order appointing the court, which reads as follows: "By command of Brig. Gen. Collins, George S. Andrew, Col. G. S. C., C. of S." (CM 101), is insufficient to

constitute a showing that the order was in fact the action of the Brigadier General. But this contention entirely overlooks the circumstance that an order appointing a court-martial is to be authenticated as may be prescribed in Army Regulations (MCM, p. 231), and that the regulations prescribed precisely the form of order here employed. Par. 13, Army Regulations 310–50, Aug. 8, 1942, in force at the time. It is the General's order although signed only by the Chief of Staff. The personal signature of the commander is required only in his action on the record of trial (Par. 87b, p. 77, MCM), and that requirement was fully complied with here (CM 231). Moreover, since petitioner offered no evidence to show that the officer convening the court was not empowered so to act, the respondent was not required to prove such authority, but could rely on the presumption of regularity which adheres to the acts of public officers. See *Stearns Co.* v. *United States,* 291 U. S. 54, 63; *United States* v. *Chemical Foundation,* 272 U. S. 14–15; *Nofire* v. *United States,* 164 U. S. 657, 660–661; *United States* v. *Royer,* 268 U. S. 394, 398; *Knox County* v. *Ninth National Bank,* 147 U. S. 91, 97.

CONCLUSION

For the foregoing reasons we respectfully submit that the petition for a writ of certiorari should be denied.

PHILIP B. PERLMAN,
Solicitor General.

T. VINCENT QUINN,
Assistant Attorney General.

FREDERICK BERNAYS WIENER,
Special Assistant to the Attorney General.

ROBERT S. ERDAHL,
BEATRICE ROSENBERG,
Attorneys.

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